

Australian Nursing and Midwifery Federation submission

*Treasury Competition Review on worker
non-compete clauses and other restraints*

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Nursing &
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Federation

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A. About the ANMF

1. The Australian Nursing and Midwifery Federation (ANMF) is Australia's largest national union and professional nursing and midwifery organisation. In collaboration with the ANMF's eight state and territory branches, we represent the professional, industrial and political interests of more than 326,000 nurses, midwives and personal care workers (PCWs) across the country. Approximately 89% of the ANMF's membership are women.
2. Our members work in the public and private health, aged care, and disability sectors across a wide variety of urban, rural, and remote locations. We work with them to improve their ability to deliver safe and best practice care in each and every one of these settings, to fulfil their professional goals, and achieve a healthy work/life balance.
3. Our strong and growing membership and integrated role as both a trade union and professional organisation provide us with a complete understanding of all aspects of the nursing and midwifery professions and see us uniquely placed to defend and advance our professions.

B. Overview of Employment Law

4. Employment in Australia is largely governed by a blend of industrial and contract law. Historically, the need for regulation in the industrial space has flowed from an acknowledgement by policy makers that there is a natural power imbalance between employers and employees that warrants redressing.
5. Most workers in Australia are considered 'national system employees' within the meaning of section 13 of the *Fair Work Act 2009* (Cth) (FW Act). These workers enjoy the benefits that flow from this legislation, including the rights and entitlements

under the National Employment Standards,¹ wages and conditions deriving from modern award coverage,² the right to collectively bargain, among other things.

6. By contrast, the law of contract, while not entirely unregulated, operates on the premise that a contract represents 'an expression of the joint will of the parties... [whereby] obligations are voluntarily assumed'.³ Classical contract theory gives no weight to any power imbalance between parties and can therefore be distinguished from industrial law in terms of their respective underpinning rationales.
7. Independent contract, or sole traders, are by definition not employees. They operate outside of the industrial framework and the contractual relationships are capable of being more in line with classical contract theory, unhampered by industrial law.
8. For the sake of completeness, the FW Act has recently been amended to include a third category of worker: the 'employee-like worker'.⁴ Short of going into detail, these workers are best understood as a hybrid of an employee with protections under the FW Act and an independent contractor without such protections.

C. Suitable for Reform

9. In the employment context, contract law operates in the spaces between industrial law. For example, a worker may be covered by an enterprise agreement that operates in their workplace, and simultaneously engaged via a written employment contract, which cannot undercut the terms of the enterprise agreement.
10. The law governing restraints of trade is a feature of contract law and can be found in the contracts of employees, independent contractors and notionally employee-like workers. Restraints of trade are not prohibited under industrial law nor any other area of law. As such, employers or other parties to a contract with a worker are at liberty to include a restraint of trade into a contract.
11. The Issues Paper circulated as part of the Treasury competition review into non-competes and other restraints (the Review) correctly and thoroughly identified the

¹ FW Act, pt 2-2.

² FW Act, pt 2-3.

³ Jeannie Paterson and Andrew Robertson and Arlen Duke, *Principles of Contract Law* (3rd ed, 2009) 1.05.

⁴ *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) s 15P.

multitude of ways in which restraints of trade needlessly hamper the free movement of workers between jobs, even when such restraints may not be enforceable. The ANMF commends the Federal Government for opening the public discussion for reform in this area through this Review.

12. The Australian Council of Trade Unions (ACTU) is Australia's peak union body, of which the ANMF is an affiliate. The ANMF has viewed the submission of the ACTU and is supportive of the positions taken therein. The broad position of the ANMF can be described as follows:

- a. A total prohibition of restraints of trade post-employment;
- b. A total prohibition of restraints for part-time and gig economy workers;
- c. A reasonableness test to be included for restraints during full-time employment, but strictly limited to related positions; and
- d. A prohibition on restrictions for workers in the health and aged care sectors, and measures to ensure existing clauses are not enforceable.

13. The Federal Office of the ANMF has sought feedback from its state and territory branches about the prevalence and impact of restraints of trade being used against its members. The ANMF will approach this submission firstly by providing some de-identified examples of restraints of trade inserted into the contracts of ANMF members, and secondly by providing responses to the discussion questions posed by the Issues Paper.

14. The following examples and case studies illustrate the use of restraints in health and aged care employment contracts. The material gathered to prepare this submission has revealed to the ANMF that restraint clauses are more widely used than expected, are often unreasonable in scope, and would therefore be unenforceable. They are included in contracts without explanation, for health and aged care workers who are not in equal bargaining position when entering contracts, and are also used for inappropriate and coercive purposes.

15. For the purposes of this submission all parties have been de-identified.

D. Case examples

1: A covert attempt to include restraints

- a. In 2021, an aged care provider in Queensland issued fresh employment contracts to existing employees as part of a “contract refresh”, initiated because the employer rearranged their corporate structure and there was a transfer of employment across to a different legal entity.
- b. The letter of offer stated: ‘While the wording and formatting is updated, the terms and conditions of employment are substantially similar and overall no less favourable than your current terms and conditions.’ The new contracts contained a restraint of trade clause, whereas the original contracts did not. No attention was drawn to this substantial change in the re-issued contracts.
- c. The letter of offer was dated 28 May 2021 and required the return of the signed letter of offer and new contract within five business days. The letter stated: ‘Prior to 6 June 2021, please read and sign your acceptance of the terms and conditions in the space provided using DocuSign. A delay in returning all paperwork may impact your ability to continue working at [employer].’
- d. Following a response from the ANMF, the employer allowed further time for employees to consider the terms of their re-issued contract. The employer also removed the restraint of trade clauses, but only from the contracts of those identified by the ANMF as union members. Member who did not wish to be identified, and presumably non-members, were required to sign a contract containing a restraint of trade.

2: Restraint used for coercive purposes

- e. In South Australia, a community care provider has used the following restraint of trade clauses in their standard employment contracts:

- i. 'By accepting this letter of offer, you acknowledge and agree that you will not, during the course of your employment or for 6 months thereafter:
 1. approach, canvass or solicit any clients or customers of the employer;
 2. work for [list of major industry competitors], direct contracts [sic]⁵ of the employer's business within South Australia.'

- f. The experience of the ANMF with this particular employer is that they appear to attempt enforcement of the restraint only for particular individuals for malicious reasons. In these instances, the employer has used the restraint of trade as a bargaining item for a negotiated exit from employment. In exchange for the employer releasing the employee from the restraint, the employee is expected to agree to waive their rights in all other potential claims they might have against the employer that they might otherwise have been able to pursue post-employment. This could include unfair dismissal, general protections, underpayment, discrimination, sexual harassment, or any other legitimate civil claim. The dynamic of the situation is such that a worker is forced to choose between choosing to enforce a legitimate right they might have with their more immediate need to secure a source of income.

3: Unreasonable scope

- a. The ANMF reports members who have, been required to sign employment contracts with extreme restraints. For example, an enrolled nurse (EN) engaged by a small community aged care provider in a regional area was required to sign a contract prohibiting her from working post-employment in an area of up to 250km from the prescribed location. The EN was also prohibited from contacting clients, being any person firm or company, who at any time in the period of 12 months prior to termination of the contract, had been a client of the employer or any associated entity.

⁵ It is assumed that this should state 'contacts'.

- b. An attempt by the employer post termination to enforce these terms was resisted by the EN, with the assistance of the ANMF.

4: Unreasonable restrictions on post-employment/business ownership

AB is a Nurse Practitioner, who works across a number of settings. She was a shareholder in a general practice, where she had a large number of patients. Due to concerns that the general practice was moving increasingly to a high turnover model of care, that compromised the quality of care provided, she decided to sell her shares in the practice.

The contract of sale initially proposed by the practice included a term that required her to agree not to work within a 25km radius of the practice for a period of 10 years. With the assistance of a lawyer, AB was able to negotiate the term to a radius of 5 km for 5 years, and to only apply to not owning a practice during the restraint period.

AB now works at but does not own a practice within a close distance from the contracting practice. She is aware that her old patients would have preferred to follow her, but have been informed by the contracting practice that her whereabouts are unknown.

5: Unreasonable and disproportionate restriction on contracting to do additional work

CD is a Nurse Practitioner with her own practice in a Melbourne suburb. CD agreed to work one morning a fortnight as a contractor at another practice, that was narrowly within a 10 km radius of her own practice. CD was asked to sign a contract that would have prohibited her from working within a 10k radius of the contracting practice if she left that practice. The effect of this would be that she would have to cease operating her primary practice in the event that the contract to work half a day a fortnight was terminated. CD refused to agree to this term and successfully negotiated to work at the contracting practice without a restraint.

6: Recovery of training costs

The ANMF is aware that in the cosmetic surgery industry in particular it is a common practice for employers to seek to recover unspecified training costs from cosmetic

nurses termination of employment within a specified period. The ANMF has assisted members in cases where the employer tries to recover so-called 'training costs' either by withholding final wages to cover the alleged costs (a breach of the Act in itself) or by threatening legal action to recover them.

Contracts in these industries frequently include clauses describing the 'training' the employee will receive in the broadest of terms, such as 'practical industry training'. The 'training' provided by the employer is usually not optional. Further, it is training the employee attends primarily for the benefit of the employer.

In demands for recovery of training costs, the employer usually provides no evidence of the actual expenses incurred by them in providing the training. Below is a sample contract term:

TERMINATION PAYMENT

24.1 If you terminate your employment other than due to the Employer's gross negligence or serious misconduct within 3 years of the Commencement Date, the following provisions apply:

(a) You must pay the Employer a one-time payment (Termination Payment) in consideration of the practical industry training which forms part of your remuneration:

- (i) \$20,000, or
- (ii) \$10,000 or
- (iii) \$5,000.

(b) The Termination Payment must be made within 14 calendar days of the Termination Date. You agree with respect to this payment, time is of the essence.

(c) Interest is payable by you to the Employer on the Termination Payment (at the rate per annum equal to the then 90-day bank bill rate plus a margin of 3%) on any portion of the Termination Payment not made within 14 calendar days of the Termination Date.

(d) Clause 24.1(c) above, is to be calculated on a daily basis.

(e) You agree that the Employer may set off or deduct from any amount payable by us to you, any amounts payable by you to us, whether or not under this Agreement or otherwise.

(f) The provisions of this clause continue despite termination of this Agreement.

24.2 Each of the above obligations are separate and independent obligations. In the event that one or more of the obligations are found to be unenforceable, the remaining obligations will continue to apply.Xx

The ANMF has successfully supported members to resist enforcement of this clause or similar attempts to recoup unspecified 'training' costs.

E. Responses to Issues Paper

Question 1: Does the common law restraint of trade doctrine strike an appropriate balance between the interests of businesses, workers and the wider community? If no, what alternative options are there?

16. The ANMF is of the view that the common law restraint of trade doctrine does not get the balance right. The ability for an employer, at the point of offering employment, to insist that a prospective employee enter into an employment contract on the condition that they also accept a restraint of trade, reinforces the power imbalance between workers and businesses. In many instances, a restraint of trade goes beyond what is reasonably necessary to protect business interests and places employees in a position where they either cannot, or fear that they cannot, work in their chosen field, in the area that they live, for a period of time.
17. In line with the ACTU position set out at paragraph 12, the ANMF believes that restraints of trade should be prohibited in all areas of work. The ANMF considers there are only very limited circumstances where a restraint may be reasonably applied. Those circumstances would include consideration of the nature of employment, the seniority of the role, remuneration and a proper assessment of what the nature of the restraint is. For instance, it may be reasonable for a senior manager in full time employment, to agree not to work for a competitor.

Question 2: Do you think the *Restraints of Trade Act 1976 (NSW)* strikes the right balance between the interest of businesses, workers and the wider community? Please provide reasons. If not, what alternative options are there?

18. The ANMF is of the view that the *Restraints of Trade Act 1976 (NSW)* (the NSW Act) has the capacity to embolden employers within that jurisdiction to draft restraint clauses that are deliberately excessive. The operation of the NSW Act provides employers with a surety that no matter how ridiculous their restraint is, if challenged a court will nonetheless preserve some elements of the restraint.
19. The consequence of this provision is that there is no incentive for an employer when it comes to the framing of a restraint clause to consider whether the restraint is reasonable. Noting the chilling effect of restraints on worker behaviour,⁶ many workers may genuinely believe that an obscene restraint may apply to them, or have to take legal action to be partially or fully released.

⁶ Issues Paper at [22].

20. The ANMF would encourage the Federal Government to consider its Constitutional powers to legislate in this space to cover the field so as to render the NSW Act inoperative.

Question 3: Are current approaches suitable for all workers, or only certain types of workers? For example, senior management, low-income workers, or care workers etc?

21. There are a range of circumstances where it is clearly inappropriate for any form of restraint to apply. The ANMF submits that restraints should be prohibited for workers in part-time employment, who are low paid and or are vulnerable to exploitation.

Vulnerable workers

22. The ANMF reiterates the challenges faced by vulnerable cohorts of workers, including low-paid women in health, care and support industries, as set out in the Issues Paper. Many of these workers also tend to be young, from culturally and linguistically diverse backgrounds, and are increasingly on temporary skilled, employer sponsored visas.⁷ Shifts in the migration system over the past decade have significantly increased the number of temporary, employer sponsored visas.

23. Employer-sponsored visas are a well-known indicator of exploitation. Workers on insecure short-term visas are reliant on their employer for their ability to stay in the country. In these scenarios, and for unsponsored migrants also, workers are pressured to accept poor or outright exploitative wages and conditions. Commonly, this includes excessive wage deductions for accommodation, unlawful or ambiguous 'claw back' mechanisms for employers to recover sponsorship costs, retention of passport by the employer, refusal to provide payslips, and contract clauses restricting labour mobility and deliberately deterring the visa holder from making complaints.⁸

24. The ANMF is aware of migrants, particularly in the aged care sector, receiving complicated contracts only in English with no translation support services provided. In some circumstances, workers will be unknowingly signing restraint clauses,

⁷ Australian Government, *Australia's Migration Trends 2022–23*, Department of Home Affairs, p.17, accessed 29 May 2024, <<https://www.homeaffairs.gov.au/research-and-stats/files/migration-trends-2022-23.PDF>>.

⁸ Migrant Workers' Taskforce, Final Report, p. 34.

namely non-compete and non-disclosure. There is not a sufficient understanding of the impact of such clauses on their current and future employment conditions including mobility and the ability to make complaints and seek redress.

25. Compliance and enforcement activity by the Department of Home Affairs has historically been poor in monitoring and addressing exploitative employer practices in sponsored visa programs, and underreporting by migrants, given the risks associated with speaking out, is likely to be significant. This has made understanding the scope of the issues difficult. That said, the ANMF is of the view that the effect of exploitative practices in visa sponsorship significantly restricts labour mobility and amounts to restraint of trade.

Care sector

26. The ANMF submits that there is no place for non-competes or restraints of trade in the care sector. In addition to care workers often being in part-time employment, low paid work and in vulnerable employment, as discussed above, care work is in high demand and is subject to skill and labour shortages. Restraints, such as those that seek to impose a geographical exclusion zone are particularly absurd in areas of worker and skill shortage. The health and aged care sectors have for instance experienced labour shortages that impact health care outcomes and in turn act as a deterrent to remaining in the sectors. Attempts to prevent movement within the health and aged care sectors would appear to be contrary to the many policy initiatives intended to address skill and labour shortages.

Question 4: Would the policy approaches of other countries be suitable in the Australian context? Please provide reasons.

27. The ANMF notes with interest the recent developments in the United States, whereby non-compete clauses have been prohibited nationwide.⁹ Of particular relevance in the health sector, is the research conducted by the Federal Trade Commission prior to introducing the rule, that found non-compete clauses and restraints imposed significant cost on the health system, and estimating the ban would reduce health care costs by between \$74 and \$194 billion in physician services

⁹ [FTC Announces Rule Banning Noncompetes | Federal Trade Commission](#)

over the next decade.¹⁰ The existing cost burden arises from limiting access to preferred health practitioners. Where people receiving health services are unable to access their preferred health practitioner, or must accept additional cost and time burden to access services, health conditions worsen, go undetected or untreated, resulting in higher health cost burden.

28. The Commission noted that the vast majority of comments from physicians and other stakeholders in the healthcare industry assert non-competes result in worse patient care and exacerbate healthcare shortages.¹¹This cost arises from limiting access to preferred health practitioners.

29. The ANMF considers the research relied upon for legislative change in the United States is relevant to this inquiry.

Question 5: Are there other experiences or relevant policy options (legislative or non-legislative) that the Competition Review should be aware of?

30. The ANMF takes this opportunity to point to concerns identified in relation to the Pacific Australia Labour Mobility Scheme (PALM).

31. The ANMF undertakes significant work in the aged care stream of the (PALM). The PALM is a temporary migration scheme dually operated by the Department of Foreign Affairs and Trade and the Department of Employment and Workplace Relations. While the PALM has positive governance and compliance elements, it continues to pose significant risks of exploitation for participants.

32. The revised PALM Approved Employer Deed and Guidelines contains clauses including various wage deductions, including but not limited to, employee health insurance, travel costs, phones and laptops, and accommodation.¹² The worker also has conditions imposed on them that 'wed' them to the employer and restrict them from changing employer without this amounting to absconsion and resulting in serious visa penalties.

¹⁰ [Federal Register :: Non-Compete Clause Rule](#)

¹¹ [Federal Register :: Non-Compete Clause Rule](#) at page 38402.

¹² Australian Government, *PALM Deed and Guidelines*, 9 May 2024, Australian Aid, accessed 30 May 2024, <<https://www.palmscheme.gov.au/resources/palm-scheme-approved-employer-guidelines>>.

33. For the low paid, majority young female PALM workers in aged care, such deductions and conditions can negate the benefits of participation in the scheme. As the Australia Institute reported¹³:
34. *'The conditions imposed on PALM workers place them at the mercy of employers in a way that would be illegal for domestic workers. Their employers are allowed to make deductions from their wages, and workers are unable to leave their employers without going through a rigorous bureaucratic process. If they chose to leave an abusive employer without approval they face the threat of having their visa cancelled'*
35. Approved Employers in the PALM scheme benefit in the market, particularly in aged care where workforce shortages are considerable and persistent, by having access to low wage, bonded and temporary workers. This places downward pressure on employer and industry investment in (domestic) workforce development, attraction and retention. The ANMF is concerned that a migration and employment program so heavily administered by the Government and two of its departments, allows for conditions that greatly diminish the vulnerable workers' ability to move employment without repercussion. Government programs should be facilitating the highest possible standard of employment conditions and behaviour by employers.

Question 6: What considerations lead businesses to include client non-solicitation in employment contracts? Are there alternative protections available?

36. The discussion paper refers to the use of client non-solicitation for workers engaged in providing services under the NDIS and in child care. The same concerns are relevant in the aged care sector, particularly in the home care sector. For example, the Home Care Packages Program is designed to allow people who are eligible for home support to choose a provider that best meets their needs. It also means the person can take their package with them if they wish to change providers.¹⁴ In these circumstances, providers may seek to tie workers delivering care, and thereby limit

¹³ The Australia Institute, *PALM Visa Conditions Exploit Pacific Neighbours Working in Lucrative Australian Industries*, Media Release, 21 December 2023, accessed 30 May 2024, <https://australiainstitute.org.au/post/palm-visa-conditions-exploit-pacific-neighbours-working-in-lucrative-australian-industries/>.

¹⁴ [About the Home Care Packages Program | Australian Government Department of Health and Aged Care](#)

choice for care recipients and the ability of aged care workers to obtain adequate hours of work and income in their preferred work area. In addition, the ANMF is concerned that this may encourage care workers to move to the gig economy in order to follow clients, and or to have access to sufficient hours of work.

Question 7: Is the impact on clients appropriately considered? Is this more acute in certain sectors, for example the care sector? Please provide reasons.

37. The ANMF considers non-competes and restraints have a significant detrimental effect on both health practitioners and their patients or clients. The US inquiry leading to the prohibition on non-competes heard submissions and made findings that restrictions on health practitioners who sought to leave a practice increased the cost of provision of health care and limited access to health care¹⁵. The ANMF considers the same concerns are present in Australian medical practices.
38. In preparing this submission, the ANMF has received anecdotal evidence which indicates that restraints are widespread in private medical practice and primary health settings. Restraint clauses are commonly required of general practitioners, nurse practitioners and allied health practitioners who are contracted to work at medical practices and community health services. Such restraints require health practitioners who leave a practice to agree not to solicit patients or clients, or not to own or work in practices within set distances of the initial practice for set periods of time (see case examples).
39. While restraint clauses, may be unenforceable in some cases, they nevertheless have a strong deterrent effect on health practitioners. As illustrated in the above case examples, the threat of enforcement can be highly intimidating, and will no doubt be effective in many instances, particularly where employees do not have union support or the knowledge and means to access legal advice. The culture of discouraging competition in health care is detrimental to the delivery of quality health services.
40. The effect of these restraints seriously limits patient access to continuity of care with their practitioner of choice. Health practitioners build therapeutic relationships with

¹⁵ Federal Trade Commission report (n10).

clients and patients which develop over time. A relationship of trust and confidence between practitioner and patient or client strengthens health outcomes. Restraint clauses actively seek to sever that therapeutic relationship, solely for the commercial benefit of the contracting practice. Such clauses, have further detrimental effects:

- They operate to limit consumer choice about selecting or maintaining a relationship with a particular practitioner;
- They reduce competition between practices, thereby acting against encouraging practices to provide the best and highest level of service possible;
- They may result in some patients and clients not continuing with treatment programs due to loss of continuity with their health provider, which results in poorer health outcomes and potential longer term cost;
- Impose additional cost for consumers who may need to travel further to access their preferred health provider;
- May result in a loss of a particular service altogether, particularly in rural and remote areas;
- Discourage health practitioners from growing and developing skills and expertise and taking up new opportunities to deliver services and
- Increase health burden and cost.

Question 8: What considerations lead businesses to include co-worker non-solicitation in employment contracts? Are there alternative protections available?

41. In health settings, particularly private practice and cosmetic surgery services, the contractual terms intended to prevent co-worker solicitation appear to be motivated by a desire to limit competition and or to protect intellectual property.
42. As discussed above in relation to client non-solicitation, co-worker non-solicitation clauses, are similarly likely to have the negative consequences of reducing free movement of employees and entrenching poor practices encouraged by a lack of competition.
43. The most obvious alternative is for health services to offer attractive, well remunerated employment and to adopt the highest possible standards of patient and client care, which of itself provides a retention incentive for health practitioners to remain. Intellectual property can be protected by alternative means.

Question 9: Is the impact of co-worker non-solicitation clauses more acute for start-ups/new firm creation or in areas with skills shortages in Australia?

44. The ANMF makes no submission with respect to start ups and or new firm creation, however, it is apparent that restrictions on starting new services, such as medical practices will reduce choice and availability of services in a particular area.
45. The issue of skills shortage is relevant to ANMF members. This is particularly the case in rural and remote areas. Attracting health practitioners to work in rural and remote areas, is a long-standing problem, that has been addressed by offering incentives, such as relocation costs and remote work payments.
46. While incentives have a place, these should not be used to bind workers unreasonably to working in a particular location. Restraints that seek to impose geographical exclusion zones are also particularly unhelpful in rural and remote areas. The impact may be that health practitioners are compelled to move away from a location in order to work, leaving a skill shortage or loss of service.
47. Restricting employment movement may in fact exacerbate skills shortages. Workers who are able to grow and develop skills through seeking and obtaining new job opportunities are more likely to remain in their chosen field and by increasing their skills, creating more opportunity for others. It is shortsighted to address the problem of skill and labour shortages by restricting post-employment movement.

Question 10: What considerations drive businesses to include non-disclosure clauses in employment contracts? Are there alternative protections, such as s 183 of *Corporations Act 2001* (Cth) available?

48. The ANMF assumes that employers who use non-disclosure clauses in employment contracts do so out of concern that any internal trade secrets might otherwise land in the hands of competitor organisations when their own employees leave their employment.
49. Aside from section 183 of the *Corporations Act 2001* (Cth), the ANMF notes that existing laws around intellectual property already provide a suitable mechanism for protecting their business interests.

50. Sub-section 35(1) of the *Copyright Act 1968* (Cth) makes clear that any copyright that subsists in a work automatically vests in the author of that work. In the context of employment, while an employee might usually be the author of their work, where such work is created in pursuance of the terms of their employment, an employment contract may provide for the intellectual property created by the employee shifting to the employer.

51. This allows for an employer to assert their legitimate business interests in retaining intellectual property that was developed by their workforce, while at the same time allowing a worker to take the skills developed during the course of their employment into other workplaces.

Question 11: How do non-disclosure agreements impact worker mobility?

52. The ANMF makes no submission to this question.

Question 12: How do non-disclosure agreements impact the creation of new businesses?

53. The ANMF makes no submission to this question.

Question 13: When is it appropriate for workers to be restrained during employment?

54. The ANMF reiterates its response provided in question 3. It is unjustifiable for an employee to be restrained by their employer from securing work elsewhere in circumstances where that employer is not able to provide adequate hours of work and wages, to provide a decent income. This places an unreasonable hardship for any employee who has a right to support themselves and their family through work.

55. The only permissible restraint during employment should be to prevent a full-time employee from taking a related position elsewhere, such as working for a competitor or setting up a competitor business while still employed.

Question 14: Is it appropriate for part-time, casual and gig workers to be bound by a restraint of trade clause?

56. A high percentage of ANMF members work part-time. For example, 56.8% of registered nurses across Australia, work part-time when compared to 32.9% across the workforce.¹⁶ Part-time work is the predominant form of employment in aged care. Of the total direct care workforce in permanent positions, (full-time and part-time positions) 93% are employed part time. By occupation, 84% of RNs are employed part time; 93% of ENs and 96% of persona care workers.¹⁷
57. Part time work is sometimes by choice, however, underemployment is also an issue. For lower paid workers, second and even third jobs are necessary to earn a decent income.
58. An employer attempt to prohibit an employee from gaining additional employment imposes not only an unacceptable threat to an employee, but is likely to mean that employee is prevented from earning an adequate income. There is no basis for such clauses. This must be seen in the context of a power imbalance, where legal knowledge of what is an enforceable clause is likely to be limited and there is a prohibitive cost in obtaining legal advice to resist or defend such contract terms.
59. Even where restraints on workers only relate to performing work for competitor businesses, this would still force workers to seek training and education for an entirely different profession, whereas they should be able to sustain an income based on their primary profession if they desire.
60. As discussed in the ACTU submission, attempts to restrain casual and gig-workers, are wholly inappropriate, particularly given the precarious nature of these types of employment and the assumption that such work is of a one-off contractual nature, rather than ongoing. Both casual and gig-workers must often rely on multiple engagements to earn a decent living.

¹⁶ Cortis, N., Naidoo, Y., Wong, M. and Bradbury, B. (2023). *Gender-based Occupational Segregation: A National Data Profile*. Sydney: UNSW Social Policy Research Centre, 33-4.

¹⁷ Department of Health (Cth), *2020 Aged Care Workforce Census Report* (Report, Released September 2021) ('2020 Census Report Table 13

Question 15: Should there be a role for no-poach and wage-fixing agreements in certain circumstances, for example:

- a. If the agreement is between unrelated businesses (e.g., competitors)?
 - b. If agreement is between businesses that are co-operating in some way (e.g., joint venture partners)?
 - c. If it is part of a franchise agreement, either horizontally (where franchisees through a common agreement do not to poach each other's staff) or vertically (where franchisors make agreements with each franchisee)?
61. The fundamental problem with no-poach or wage-fixing agreement is that there is no buy-in from the workforce, even where such an agreement has not been kept secret. The ANMF submits that the Federal Government should prohibit employers from engaging in such anti-competitive conduct that places a downward pressure on wages in favour of the profit margins of businesses.
62. The union movement operates on the basis that wages and conditions are negotiated collectively, and ideally agreement is reached between employers and employees. It should be noted that Part 2-4 of the FW Act now facilitates the creation of multi-enterprise agreements. So far as this concerns joint-venture partnerships between businesses, the ANMF observes that it is possible to develop wages and conditions that are uniform between joint venture businesses in a way that does not sideline workers' rights to collectively negotiate competitive wages. It is therefore unnecessary to permit no-poach or wage fixing agreements for a joint venture.
63. The same principle applies in the case of franchises.

Question 16: Are there alternative mechanisms available to businesses to reduce staff turnover costs without relying on an agreement between competitors?

64. It seems patently obvious that if an employer wants to retain its existing workforce, it could do so primarily by providing more generous wages and conditions than their competitors, as well as examining the cultural elements of their workplace that might prompt employees to reconsider remaining in their positions.

Question 17: Should any regulation of no-poach and wage-fixing agreements that harm workers be considered under competition law as an agreement between businesses (for example reconsidering the current exemption), or under an industrial relations framework?

65. The ANMF submits that the appropriate place for any regulation around no-poach or wage-fixing agreements would be in the industrial relations framework. This could be achieved in a similar manner to the way in which pay secrecy clauses were recently prohibited under Part 2-9, Division 4 of the FW Act.

66. In order for regulation to be effective, consideration would need to be given to ensure that no-poach and wage-fixing agreements were not negotiated and kept secret, as may be the case currently. While the ANMF's position is that such agreements should be prohibited, to the extent that the Federal Government is persuaded to retain these agreements in some form, there should be a requirement for parties to such agreements to make public disclosure. Failure to do so should attract an appropriate penalty.

Question 18: Should franchisors be required to disclose the use of no-poach or wage-fixing agreements with franchisees?

67. As above.

Question 19: Are there lessons Australia can learn from the regulatory and enforcement approach of no-poach and wage-fixing agreements in other countries?

68. The ANMF makes no submission to this question.

F. Conclusion

69. The ANMF agrees with the Competition Review Taskforce's concerns that the impact of non-compete and restraint clauses has as 'chilling effect' on worker mobility, are prohibitively difficult to challenge and have detrimental consequences for the allocation of labour and information, hampering productivity growth and innovation.

70. Further, the ANMF submits non-competes and restraints have no place in the health and aged care sectors. Such clauses are unfairly targeted at workers who are

predominantly female, part-time and often low or lower paid employees. Any restraint that restricts workers from obtaining sufficient employment or accessing new employment in the location of choice inhibits the chance to improve skills, experience and income. In turn, non-compete and restraint clauses, go further than limiting opportunity for nurses, midwives and care workers to work freely. Such clauses, ultimately have a detrimental impact on access to health and aged care services and the quality of care. This cost is borne by people receiving health and aged care services and the economy more broadly.

71. The ANMF encourages this inquiry to move to introduce bans on non-compete and restraint clauses and to make existing contractual terms which seek to restrain the conduct of employees during and after the contracted employment, void.